88-57



# In The
# Supreme Court of the United States

HERBERT M. FRIEDMAN,
*Petitioner,*

-VS-

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual, and FRANK MEHARG,
an individual.
*Respondents.*

## PETITION FOR CERTIORARI TO THE U.S. SUPREME COURT

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## QUESTIONS PRESENTED FOR REVIEW

WHETHER ABSENT A SHOWING OF GOOD FAITH AND COMPLETE DISCRETIONARY RESPONSIBILITY, ADMINISTRATIVE OFFICERS PERFORMING MINISTERIAL FUNCTIONS SHOULD BE ALLOWED THE PROTECTION OF QUALIFIED IMMUNITY FROM ACCUSATIONS OF CIVIL RIGHTS VIOLATIONS.

WHETHER THE ISSUE OF QUALIFIED IMMUNITY, HAVING NOT BEEN PRESERVED NOR ADDRESSED BY THE TRIAL COURT, WAS PROPERLY RULED UPON BY THE COURT OF APPEALS WHEN THE OPINION BELOW BEING CHALLENGED ADDRESSED ONLY THE ISSUE OF ABSOLUTE IMMUNITY.

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HERBERT M. FRIEDMAN,
*Petitioner,*

-vs-

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual, and FRANK MEHARG,
an individual.
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, HERBERT M. FRIEDMAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 11, 1988.

## OPINIONS BELOW

On April 11, 1988, the Sixth Circuit Court of Appeals issued an opinion affirming the United States District Court for the Eastern District of Michigan's decision and order granting summary judgment to the Respondents. This opinion is not reported and is set out in the Appendix, *infra*, at *1a*. The decision of the United States District Court for the Eastern District of Michigan, Southern Division is set out in the Appendix, *infra*, at *2a*.

It should be noted that while the trial court granted summary judgment to the Respondents solely on the basis of absolute immunity, the Sixth Circuit Court of Appeals issued their affirmance on the grounds of qualified immunity. The issued of qualified governmental immunity was never ruled upon by the trial court.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 11, 1988. This Petition is being filed within ninety days of that date as required by 28 USC Sec. 2101, and pursuant to this Court's jurisdiction which is invoked under 28 USC Sec. 1254.

## STATEMENT OF THE CASE

Petitioner, HERBERT FRIEDMAN, is a doctor of veterinary medicine, licensed to practice veterinary medicine within the State of Michigan in 1967. Dr. FRIEDMAN was appointed and licensed as a state veterinarian by the Michigan Racing Commission for the Saginaw Valley Downs Race Track for the racing season of 1980.

Respondents, PATRICK HALL, JOSEPH KENNEDY and FRANK MAHARG, were employed as racing stewards at Saginaw Valley Downs, and Respondent, JAMES WRIGHT, was an out-state race track supervisor. These individuals were responsible for suspending Dr. FRIEDMAN's occupational license, suspending Dr. FRIEDMAN's horse owning privileges in Michigan harness racing, and denying Dr. FRIEDMAN the use and privileges of certain Michigan race tracks from July 7, 1982 through December 31, 1982.

It is Dr. FRIEDMAN's contention that the individual Respondents acted separately and in conspiracy with each other to wrongfully deprive him of these rights and privileges because of his Jewish faith.

Dr. FRIEDMAN was not able to present the merits of his contentions to a trier of fact because the allegations were summarily dismissed. Respondents were granted summary judgment in the trial court based on a ruling that they were entitled to absolute governmental immunity. That decision was affirmed by the Sixth Circuit Court of Appeals on other grounds.

The punishment imposed upon Dr. FRIEDMAN stems from an alleged incident which took place on or about June 7, 1982. Dr. FRIEDMAN was at the Saginaw Valley Downs Race Track when he was summoned by a horse owner into a restricted area.

At the horse owner's request, Dr. FRIEDMAN entered the paddock area in order to observe an injured horse's leg. Dr. FRIEDMAN did not perform any veterinary service other than examining the leg.

After the examined horse won the fourth race that day, another trainer informed one of the state investigators that Dr. FRIEDMAN had been in the restricted area. The informant further stated that she observed Dr. FRIEDMAN handle a loaded syringe, ostensibly for use on the injured horse.

The state investigator in turn reported this allegation to the racing steward, who subsequently issued a notice of suspension to Dr. FRIEDMAN and cited a violation of Rule 59, relating to "admission to paddock."

An administrative hearing was scheduled in which Dr. FRIEDMAN was called to respond to the allegations. Before the stewards' hearing, Dr. FRIEDMAN was advised by members of the racing commission that there was no need for him to bring legal counsel. Dr. FRIEDMAN proceeded to the hearing without the aid of an attorney.

Following the hearing, Dr. FRIEDMAN was suspended from all race track privileges from July 7, 1982 through and including December 31, 1982. This decision was based upon Dr. FRIEDMAN's alleged violation of Rule 59.

All charges stemming from this incident were later dismissed. Moreover, drug tests proved that the horse had not been injected prior to the race.

The severity of the punishment given to Dr. FRIEDMAN by the stewards for his alleged violation of Rule 59 was unprecedented. No other horseman, let alone a licensed veterinarian, had then or now ever been so severely treated for having allegedly violated Rule 59. The six month suspension of all race track privileges to Dr. FRIEDMAN was disproportionate and vastly exceeded any other sanction previously imposed. Dr. FRIEDMAN immediately undertook an administrative appeal and requested an executive stay of the stewards' ruling.

Upon the completion of the *de novo* appeal hearing of August 5, 1982, Dr. FRIEDMAN was completely vindicated by the racing commissioner. The hearing officer, Assistant Racing Commissioner John P. Conley, rendered an opinion setting aside and vacating the stewards' decision on December 8, 1982. However, this was not the effective date of the Petitioner's exoneration. The order was not signed until some time in mid December, 1982, and Dr. FRIEDMAN was not notified until about December 21, 1982. Dr. FRIEDMAN's vindication came ten days before the actual expiration of his six month long suspension.

Rumors, innuendos and actual published notice of his suspension caused Dr. FRIEDMAN severe financial distress, mental anguish and embarrassment. His otherwise excellent reputation was blackened and Dr. FRIEDMAN's practice suffered greatly.

Petitioner was never granted a stay of execution of the steward's ruling despite his two requests. Moreover, the reversal and vacating of the stewards' ruling was not published in the same mode or vein as was the notice of his suspension.

Dr. FRIEDMAN filed suit in the United States District Court for the Eastern District of Michigan, Southern Division, on July 1, 1985. In his Complaint, Dr. FRIEDMAN

alleged that Defendants deprived him of rights and privileges guaranteed by the Constitution and Laws of the United States and the State of Michigan under color of law, in direct violation of 42 USC Sec. 1983. Further, Dr. FRIEDMAN alleged that he was denied equal protection of the laws under 42 USC Sec. 1985.

As a result of discovery, Dr. FRIEDMAN filed a Motion to Amend his Complaint on September 10, 1986. The trial judge never made a ruling on this Motion and Petitioner was never allowed the opportunity to amend his Complaint.

The Respondents filed a Motion to Dismiss on October 3, 1986, raising the issue of governmental immunity. Petitioner filed his response to this Motion on October 22, 1986. There were no oral arguments heard on this Motion, and Judge Lawrence Zatkoff, United States District Court, Eastern District of Michigan, issued a Memorandum Opinion and Order granting Defendant's Motion for Summary Dismissal on January 12, 1987.

Dr. FRIEDMAN, insisting that this ruling was based on the misapplication of the governmental immunity doctrine, filed a timely appeal with the Sixth Circuit seeking reversal. An unpublished decision filed on April 11, 1988, affirmed the decision of the District Court. Although the District Court granted summary judgment based on absolute immunity, the Court of Appeals never definitively ruled on Dr. FRIEDMAN's contention that the grant of absolute immunity was improper and unwarranted. Rather, the Court of Appeals ruled that Defendants had established a claim of qualified immunity, and, further, stated in its opinion that Dr. FRIEDMAN had made out no prima facie case for religious bias.

Petitioner contends that neither of these two issues were properly before the Sixth Circuit Court of Appeals and, in any event, respondents are not entitled to qualified immunity in this case.

Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, or, in the alternative, that this Honorable Court vacate the decision below and remand this cause for a proper determination of the defense of qualified immunity.

## REASONS FOR GRANTING THE WRIT

### A.

### ABSENT A SHOWING OF GOOD FAITH AND COMPLETE DISCRETIONARY RESPONSIBILITY, THE RESPONDENT RACE TRACK OFFICERS ARE NOT ENTITLED THE PROTECTION OF QUALIFIED IMMUNITY FROM ACCUSATIONS OF CIVIL RIGHTS VIOLATIONS

The Court of Appeals' decision, granting race track stewards qualified governmental immunity, does not comport with the mandate of controlling law. Although it has been conceded by the Sixth Circuit that "lower federal courts are hopelessly split as to the type of immunity to be accorded to local officials", certain guiding principals have been consistently made clear. *Manion* v *Michigan Board of Medicine*, 765 F2d 590, 593 (6th Cir. 1985). (Citations omitted)

In general, the doctrine of governmental immunity stems from a determination that officials of government should exercise their duties unencumbered by fear of a lawsuit with respect to acts done in the course of their duties. *Barr* v *Mateo*, 360 US 564, 79 Sup Ct. 1335, 3 L. Ed. 2d 1434 (1959); *Howard* v *Lyons*, 360 US 593, 79 Sup. Ct. '331, 3 L. Ed. 2d 1454 (1959); *Tenney* v *Brandhove*, 341 US 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951); *Manion, supra*, at 592. Whereas an absolute immunity defense will be successful at the outset, if the official acts are within the scope of the immunity, a qualified immunity defense depends upon the circumstances and motivations of the official's actions. *Imbler*

v *Pachtman*, 424 US 409, 419 n. 13, 96 S. Ct. 984, 989. 13, 47 L. Ed. 2d 128 (1976).

In terms of the scope of the immunity granted, an attempt has been made to strike a balance between the desire to encourage fearless public service and the desire to avoid abuse of the doctrine. Thus, high officials require greater protection in exercising their duties than those with less complex discretionary responsibilities. *Harlow* v *Fitzgerald*, 457 US 800, 807 102 S. Ct. 2727, 73 L. Ed. 2d. 396 (1982).

Under Michigan law, lower level officials are immune from tort liability only when they are "performing discretionary-decisional, as opposed to ministerial-operational acts." *Ross* v *Consumers Power*, 420 Mich 567, 592, 363 NW2d 641, (1984) This test essentially mirrors the intent expressed by the United States Supreme Court: those performing less complex responsibilities deserve less protection through governmental immunity.

It is Petitioner's contention that the racing stewards in this action were lower level officers and/or agents of the deputy racing commissioner. Their functions are essentially investigatory in nature and their duties do not rise to the level of those which deserve the protection of even qualified governmental immunity.

The racing commissioner's office consists of a hierarchy of people with various job responsibilities. There is one racing commissioner, who employs deputy racing commissioners. The deputy racing commissioner is responsible for promulgating, interpreting and defining the racing rules and issuing memoranda expounding official racing policies and objectives. Next in line are the racing stewards, who only implement the procedures at the race track. The racing steward investigates or patrols the track area, acting upon reports of state investigators.

The duty of the racing steward includes the enforcement of regulations and rules in all areas around the paddock and

track. These duties are ministerial in nature. At best, the duties of a racing steward require minor discretionary responsibilities.

In any event, *all* officials, like any other citizen, are charged with knowledge of the law and should be held accountable where feasible, for their personal misconduct. *Manion, supra.* at 592, citing *Halperin* v *Kissinger*, 424 F. Supp. 838, 843 (D.D.C. 1976).

*Ross* v *Consumers Power, supra*, sets forth the test in Michigan for determining when officials may be immune from tort liability.

> (.5) Judges, Legislators, and the highest executive officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their respective judicial, legislative and executive authority. Lower level officers, employees, and agents are immune from tort liability only when they are:
>
> (a) Acting during the course of their employment and are acting, or reasonably believe they are acting within the scope of their authority;
>
> (b) Acting in good faith, and;
>
> (c) Performing discretionary-decisional, as opposed to ministerial-operational acts.

*Ross, supra.* at 592.

When an individual is alleged to have committed *ultra vires* activity, that individual will never be immune from liability whether or not his actions were discretionary or ministerial. *Ross, supra.* at 631. *Ultra vires* activity by its very nature is unauthorized and outside the scope of employment. The idea of *ultra vires* activity also suggests that the individuals were acting in bad faith. Bad faith is alleged by the Petitioner as the unconstitutional conduct of the respondents in singling Dr. FRIEDMAN out for arbitrary, capricious and disproportionate punishment.

A claim of qualified immunity is an affirmative defense which requires "good faith". Today's standard is an objective one:

> The present standard is that of determining the objective legal reasonableness of an officials conduct as measured by clearly established law. The law is that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

*Manion, supra.* at 597, citing *Harlow* v *Fitzgerald*, 457 US 800, 818 (1983).

The test is an objective one so as to afford victims of constitutional and statutory violations remedies to which they are entitled:

> By defining limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

*Manion Id*, citations omitted.

Although an official my be technically eligible for the protection of qualified immunity, the circumstances concerning the alleged misconduct may leave the alleged wrongdoer without any recourse to qualified immunity:

> The fate of an official entitled to qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

*Imbler* v *Pachtman, supra.* at 419, n.13.

Petitioner respectfully submits that the individual respondents acted in bad faith, and outside their proper scope of authority in their treatment of Dr. FRIEDMAN. The record is replete with evidence of the respondents' seletive investigation, prosecution and sanction of Dr. FRIEDMAN. Respondent WRIGHT, a witness in the administrative proceedings, acted in concert with the other individual respondents by giving a slanted version of the facts. The common goal was to pave the way for punishing Dr. FRIEDMAN beyond any precedented extent.

When the allegations against Dr. FRIEDMAN regarding the alleged syringe proved to be unsupported by any credible evidence, the respondents refused to withdraw the charges.

Furthermore, the racing stewards did not act in good faith. The imposition of a six month suspension of all race track privileges for an alleged technical violation of Rule 59 was unheard of. This severe punishment was unprecedented. Any individual can be expected to know that such discriminatory conduct would violate statutory and individual constitutional rights. Although Respondents should have been made to hesitate, their relentless discriminatory pursuits did not cease.

Although the issues of qualified immunity inherently lend themselves to questions most appropriately decided by a jury, summary judgment as to qualified immunity is proper under some circumstances. In the qualified immunity context or "good faith immunity doctrine",

> "... immunity may be claimed and summary judgment may be granted when a defendant establishes that he neither knew nor reasonably could have known, that his conduct would violate a clearly established constitutional right of the plaintiff. The clarity of the law guiding a defendant's conduct is as crucial in determining whether he acting in good faith."

*Manion, supra.* at 597–598 citations omitted.

Even the lowest level public servants acting in purely ministerial capacities, as the stewards in the instant case,

must be considered to know that singling out individuals for disparate punishment by virtue of their religion is no different than discriminating against individuals for their race or sex. The clarity of the law is only mirrored by the grossness of the conduct. Such misconduct is apparent to anyone. Such a violation, then, suggests blatant disregard of the law, and obvious bad faith.

**B.**

**THE ISSUE OF QUALIFIED IMMUNITY, HAVING NOT BEEN PRESERVED NOR ADDRESSED BY THE TRIAL COURT, WAS NOT PROPERLY RULED UPON BY THE COURT OF APPEALS WHEN THE OPINION BELOW BEING CHALLENGED ADDRESSED ONLY THE ISSUE OF ABSOLUTE IMMUNITY.**

Although it is Petitioner's contention that Respondents are not entitled to qualified immunity, Petitioner contends that it was error for the Sixth Circuit Court of Appeals to rule on this issue altogether.

When Judge Zatkoff issued his opinion granting summary judgment to the Respondents, the issue of qualified immunity was not addressed. Rather, the Judge based his decision solely upon absolute immunity. This is the issue that the Petitioner appealed in the Sixth Circuit Court of Appeals. Yet, after a lengthy discussion on the merits to the claim of absolute immunity, the Sixth Circuit refrained from ruling that Respondents were entitled to absolute immunity. Rather, the Court of Appeals affirmed the decision below, granting summary judgment to the Respondents, asserting that the Defendant-Appellees were entitled to qualified immunity. No conclusion as to absolute immunity was reached.

> Even if absolute immunity were not appropriate as a matter of law, here defendants have established a claim of qualified immunity.

As a general rule, in order to avoid the delay and expense incident to appeals, reversals and new trials upon grounds which might have been corrected in the trial court, the appellate courts only consider questions which were raised and reserved in the lower court. *McGrath v Manufactuers Trust Co.*, 338 US 241, 70 S.Ct. 4, 94 L Ed 31 (1949). In the same vein, an appellate court will usually only consider the case upon a theory which was ruled upon in the court below. *Dunn v United States*, 284 US 390, 52 S.Ct. 189, 76 L Ed 356 (1931).

It is Petitioners contention that the Sixth Circuit Court went outside the proper scope of its reviewing function by ruling on an issue that was not properly before it: the issue of qualified governmental immunity.

In addition, the decision to grant or deny the defense of qualified immunity is one which is particularly dependent upon the facts and circumstances surrounding the alleged wrongful acts. Thus, a trial court is obviously better suited to make such a determination.

Although this Court has made it clear that an official's claim of qualified immunity *may* support a motion for summary judgment, a mere assertion of its entitlement is *not* sufficient. See: *Harlow v. Fitzgerald*, *supra*. Where an official is found to have acted without regard or in deliberate disregard to potential violations of known constitutional or statutory rights, an official is not entitled to the defense of qualified immunity. *Id.* The defendant claiming the immunity must have acted in good faith. Such a fact-finding is often better left for a jury's determination. At least, the issue is better suited for a determination by the trial court.

In *Harlow*, *supra*, the merits of a qualified immunity defense were considered, but the Court eventually ruled that this issue could be better determined by the trial court:

> We think it appropriate, however, to remand the case to the District Court for its reconsideration of this issue

> in light of this opinion. The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

*Harlow*, *supra* at 820.

Based on this sound rationale, if *Certiorari* is not granted, the decision below should nevertheless be vacated and the cause remanded to the district court for further findings.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit; or, in the alternative, the ruling below should be vacated and the case remanded to the district court for further findings.

Respectfully submitted,

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*NOT RECOMMENDED FOR FULL TEXT PUBLICATION*
*See, Sixth Circuit Rule 24*

NO. 87-1158
**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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HERBERT M. FRIEDMAN,
*Plaintiff-Appellant,*

v.

PATRICK HALL; JOSEPH KENNEDY; JAMES WRIGHT; and FRANK MEHARG,
*Defendants-Appellees.*

ON APPEAL from the United States District Court for the Eastern District of Michigan

DECIDED AND FILED _____

BEFORE: **KEITH, WELLFORD,** and **NELSON,** Circuit Judges.

**PER CURIAM.** Plaintiff sued defendants Hall, Kennedy and Meharg in their capacity as racing stewards at the 1982 Saginaw Valley Downs race meeting. Friedman, a veterinarian, claims that the three racing stewards, along with defendant Wright, a racing supervisor, acted separately and in conspiracy with each other to deprive him of his constitutional rights under color of state law because of his Jewish faith in suspending his occupational license and suspending him as a horse owner in Michigan harness racing and in denying him the use and privileges of certain Michigan racetracks from July 7, 1982 through December 31, 1982.[1]

The acts of the defendants, of which Friedman complains, were the result of a charge against Friedman by a horse trainer, Linda Droscha, that she had witnessed him enter the

[1] Friedman's complaint includes a claim under the Michigan Elliott-Larsen Civil Rights Act, M.S.A. § 3.548. In his response to the defendants' motion for dismissal and/or summary judgment, Friedman conceded that he had failed to state a claim for relief under Michigan law.

paddock area at Saginaw Valley Downs on June 9, 1982 and examine a horse entered to race that evening. In addition, Droscha alleged that she observed Friedman give a syringe filled with white cloudy fluid to the horse's owner, who went behind the horse briefly and then returned the empty syringe to Friedman. She communicated her allegations to a State investigator, who in turn notified the stewards.

On June 10, Friedman was advised by the stewards that a hearing would be conducted to determine whether Friedman had in fact committed any violations of the Michigan Racing Law, M.S.A. § 18.966 (31) *et al.* or the Rules of the Racing Commissioner promulgated pursuant thereto. The Rules, in pertinent part, provide:

> Admission to paddock — . . . No person shall be admitted to the paddock or receiving barn except the owners, trainers, drivers and grooms of the horses actually competing in the races of the particular day or night, and such other persons as are specifically authorized by the commission . . .

M.S.A. § 18.966(54) proscribes as a misdemeanor the possession of a syringe in an area where horses are kept at a racetrack. Rule 431.62(b) regulates controlled medications administered to horses and provides for disciplinary action against a veterinarian who does not comply with its provisions.

A hearing was conducted, and defendant Wright was present throughout both days. He both questioned a witness and offered commentary regarding two warnings previously received by Friedman for conduct similar to his alleged actions of June 9, 1982. It is uncertain, however, whether Wright was ever called or sworn as a witness.

Friedman was advised at the commencement of the hearing of his right to counsel, but he now contends he was told he would not need an attorney. He was allowed to cross examine witnesses and to call his own witnesses to testify. He admitted during the course of the proceedings that he

had been in the paddock area in violation of the rules, but argued that his conduct was justified by an urgent situation requiring his professional skills. He denied having given the horse's owner a syringe.

The stewards' ruling found Friedman to have violated Rule 431.34(d)(59) and suspended his license and use and privilege of racetracks in Michigan under the supervision of the Racing Commissioner. After a de novo hearing, the deputy racing commissioner, Conley, set aside the stewards' decision, holding that no clear policy existed regarding emergency treatment of animals nor what constituted "paddock area." He intimated that the stewards had selectively and arbitrarily enforced the rules and regulations against Friedman. Conley's opinion was thereafter adopted by the Racing Commissioner just ten days before the license suspension was to have ended. Friedman's previous request for a stay of the stewards' ruling had been denied by the Racing Commissioner.

Defendants filed a motion to dismiss or for summary judgment more than a year after the complaint was filed in this cause. Defendants argued both that they were immune from suit and that the complaint failed to state a claim upon which relief could be granted. In support of the motion, the defendants submitted affidavits, attesting to their good faith in suspending Friedman's license and to their lack of knowledge that Friedman was Jewish. All four defendants attested to Wright's lack of participation in the decision making.

Friedman's response to the motion was never filed in court but was apparently sent directly to the district court and is before us by stipulation. In his response, Friedman argued the legal issue of immunity and then disputed defendants' motion to dismiss by arguing that the motion was inappropriate on the "dawn of trial" without consideration of all matters adduced in discovery. Friedman filed no evidence in support of his response, and specifically, he failed to file the transcript of the deposition of Conley, although the deposition had been taken almost two months before. Friedman made brief references to his own deposition testimony.

Friedman also filed a motion to amend his complaint, but he attached no copy of the proposed amendment, simply averring that an amendment was needed to conform the pleadings to unspecified evidence obtained during discovery. That motion was never pursued nor acted upon.

Judge Zatkoff granted summary judgment to the defendants finding the three stewards to be immune from suit because of their quasi-judicial function. He noted their neutrality, their need to be free from harassment, and the procedural safeguards involved in the procedures afforded for Friedman's benefit. Finally, he noted the strong public interest in the strict regulation of horse racing, citing *Berry v. Racing Commissioner*, 116 Mich. App. 164 (1982). He also determined defendant Wright to be immune from suit as a witness under *Briscoe v. LaHue*, 460 U.S. 325 (1983).

Friedman requested, pursuant to Fed. R. App. P. 10(e), that this court allow him to supplement the joint appendix to include the Conley deposition transcript which was never filed in district court, and this request was granted so that Friedman would not suffer from his trial counsel's asserted incompetency in failing to follow the necessary procedures. Friedman obtained new counsel for appeal purposes.

We do not consider the Conley transcript, however, in reaching a disposition of this appeal. The purpose of Rule 10(e) is to supplement the record to accurately reflect *what was before the district court. S. & E Shipping Corp. v. Chesapeake & Ohio Railway Co.*, 678 F.2d 636, 641–42 (6th Cir. 1982). Failure to adhere to this principle would impair the "policy of fostering judicial efficiency" and would result in prejudice to litigants who have a right to rely on the record made in the district court.[2]

---

[2] The relevance of the Conley deposition is marginal at best if we were to consider it.

The factors to be considered in determining whether an official is entitled to quasi-judicial immunity have recently been articulated:

> (a) the need to assure that the individual can perform his functions without harrassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

*Cleavinger* v. *Saxner*, 474 U.S. 193, 202 (1985) (citing *Butz* v. *Economou*, 438 U.S. 478, 512 (1978)). The doctrine focuses not upon the official's status but upon his functional capacities. *Manion* v. *Michigan Bd. of Medicine*, 765 F.2d 590, 593 (6th Cir. 1985). Persons such as judges, prosecutors acting in their adversarial capacity, and witnesses are absolutely immune from a civil rights suit for damages. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 904 (1976); *Briscoe* v. *LaHue*, 460 U.S. 325 (1983).

Defendant stewards have the burden of showing that public policy mandates their absolute rather than merely qualified immunity. *Butz*, 438 U.S. at 506. In *Cleavinger*, the Court recognized the public's need for effective prison discipline, but found that the committee members' function was not a "'classic' adjudicatory one" because their decision making involved resolution of credibility conflicts between prisoners and fellow employees and because they were direct subordinates of the warden who reviewed their decisions. The fact that the committee did determine guilt or innocence, hear testimony and receive documentary evidence, evaluate credibility and weigh evidence and render decisions was insufficient to overcome this "relationship between the keeper and the kept." 474 U.S. at 204. Friedman makes no specific argument regarding Wright's function as a witness.

Racing stewards are appointed pursuant to M.S.A. § 18.966(35). They are independent contractors according to their affidavits. The stewards' authority is derived from Rule 431.35(e). Pursuant to that rule, the stewards are authorized to seek subpoenas to compel the attendance of witnesses and the production of evidence. They may administer oaths and examine witnesses and they submit a report of their proceedings. They may conduct investigations, and have broad authority to determine penalties. Their decisions are appealable to the Racing Commissioner and subsequently to the state circuit court. M.S.A. § 18.966(41)(5). We conclude that their function in many ways corresponds to that of a prosecutor in his adversarial role and that of a judge in conducting proceedings. They are neutral, appointed officials and they acted on the charge of a horse trainer, in no way related to their positions as stewards. In *Freeman v. Blair*, 793 F.2d 166 (8th Cir. 1986),[3] the court indicated its general inclination to grant absolute immunity for the initiation of administrative proceedings for license suspension, but denied absolute immunity because the events leading to the initiation of suspension proceedings were improper or suspect. Even if absolute immunity were not appropriate[4] as a matter of law, here defendants have established a claim of qualified immunity. *Berry*, a Michigan case, moreover, sets forth in strong terms the need for police regulation of horse racing, which is inherently fraught with fraud and corruption. The racing stewards are the highest officials at the racetrack charged with protecting that public interest. Friedman has offered no response to the defendants' affidavits which attest to Wright's lack of participation in the ruling against Friedman. Therefore he, too, is entitled to immunity under the circumstances. *See Briscoe v. LaHue*, *supra*.

---

[3] Certiorari has been granted in this case. 107 S. Ct. 3254 (1988).

[4] Although we do not decide in this case whether defendants are entitled to absolute immunity, absolute immunity may be warranted in this case under the teachings of *Butz* and *Cleavinger*.

In our consideration of the record in this case, we find that Friedman made out no *prima facie* case. He presented no evidence of religious bias. We consider it irresponsible for a party publicly to charge another of anti-semitism without any evidence to support such a claim. We **AFFIRM** the decision of the district court and further assess all the costs of this appeal against plaintiff.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

HERBERT W. FRIEDMAN,
*Plaintiff,*

vs.

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual,
and FRANK MEHARG, an individual,
*Defendants.*

Case No.
85-CV-72940-DT

Honorable
Lawrence P. Zatkoff

**MEMORANDUM OPINION AND ORDER**

**AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 12th day of January, 1987.**

**PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE**

This is a federal civil rights action brought pursuant to 42 U.S.C. §1983 for the alleged unlawful prosecution of the Plaintiff, Dr. Herbert M. Friedman, D.V.M., in administrative proceedings before the State of Michigan Office of the Racing Commissioner. Plaintiff seeks damages against three State Racing Stewards as well as a witness who testified against him at a stewards' hearing. The case is presently before the Court on Defendants' Motion to Dismiss and/or for Summary Judgment. Since in this case matters outside of the pleadings will be considered by the Court, this motion will be treated as a motion for summary judgment pursuant to Rule 56, F.R.Civ.P. 12(b).

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead*

*Containers*, 779 F.2d 146 (6th Cir. 1986); Fed. R. Civ. P. 56(c). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *United States v. Diebold*, 368 U.S. 654 (1962); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979).

## I.

Plaintiff, Herbert M. Friedman, is a doctor of veterinary medicine. He is further licensed by the State of Michigan Office of the Racing Commissioner as both an owner and a licensed veterinarian.

The events in dispute occurred on June 9, 1982. On that day, Dr. Friedman was present at Saginaw Valley Downs as a spectator. Prior to the beginning of the day's race program, a horse owner, one Mr. Eugene Miller, summoned Dr. Friedman to the paddock area to look at his horse whose leg was apparently cut. The horse, Propolis, was owned by Mr. Miller and was entered in the fourth race at Saginaw Valley Downs on that day. Dr. Friedman entered the paddock area and attended to the animal.

At this juncture, the various accounts of the incident vary greatly. A trainer and groom attending to a horse in the adjacent stall claim that they observed Dr. Friedman hand a syringe filled with a cloudy substance to Mr. Miller and leave the stall shortly thereafter. The witnesses then claim that the horse Porpolis later displayed peculiar behavior while warming up for the fourth race on the date in question. The horse Porpolis went on to win the fourth race at Saginaw Valley Downs that day.

Following the conclusion of the race program on June 9, 1982, one of the witnesses reported to an investigator of the

Racing Commissioner's Office that she had seen Dr. Friedman in the barn area treating the horse Propolis prior to that day's race. The investigator in turn reported this to the racing stewards, who pursued the matter in further depth. On July 4, 1982, subsequent to a hearing, the racing stewards issued a notice of suspension or fine wherein Dr. Friedman was cited for violation of the rules and regulations promulgated by the Racing Commissioner for the State of Michigan. The stewards penalized Dr. Friedman by imposing a full suspension and denied him the privilege of entering the grounds of any and all tracks under the supervision of the Michigan Racing Commissioner until the end of the calendar year 1982. The penalty was based on a finding that Dr. Friedman had knowingly and willfully violated state law in entering the paddock area at Saginaw Valley Downs without authorization and practicing veterinary medicine on the horse Propolis who was entered in the fourth race on the evening of June 9th.

On July 7, 1982, Plaintiff appealed to the Racing Commissioner for a de novo review of the alleged rule violation and the stewards' ruling against him. A de novo contested case hearing was subsequently conducted on August 3, 1982 before the Commissioner's Hearing Officer under the contested case provisions of the Michigan Administrative Procedures Act. M.C.L.A. §24.271 *et seq.* On December 21, 1982 the Racing Commissioner adopted the opinion and recommendation of the hearing officer, and entered an order reversing and setting aside the original ruling of the racing stewards. The instant Complaint was then filed on July 1, 1985, alleging various federal constitutional violations as well as alleged violations of the Michigan Elliott-Larsen Civil Rights Act. The latter claim has since been dropped by Plaintiff, and thus only Plaintiff's federal constitutional claims are properly before the Court.

As mentioned previously, Plaintiff's Complaint names as Defendants Racing Stewards Patrick Hall, Joseph Kennedy and James Wright. These three stewards were the ones who

presided over the initial hearing conducted by the Office of the Racing Commissioner. Plaintiff also names as Defendant one Frank Meharg, a witness at the stewards' hearing. By way of the instant motion, all Defendants claim that they are entitled to summary judgment based on various applications of the doctrine of immunity. With respect to the individual stewards, these Defendants claim they are entitled to absolute immunity because of the quasi-judicial nature of the relevant proceedings herein. Alternatively, these Defendants argue that they are at least entitled to a qualified immunity for their actions. With respect to the remaining Defendant, Meharg, this Defendant argues that he is entitled to absolute immunity because his only participation in the proceedings herein was limited to that of a witness. Because of the oft-confused and otherwise elusive nature of the constitutional immunity doctrine, a careful analysis of the basis for judicial immunity is warranted.

## II.

Section 1983 of the Civil Rights Act provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory." 42 U.S.C. §1983. The Supreme Court has broadly described the purpose of §1983 in the following terms:

> "As a result of the new structure of law that emerged in the post civil war era — and especially of the Fourteenth Amendment, which was its centerpiece — the role of the federal government as a guarantor of basic federal rights against state power was clearly established. [citations omitted] Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the constitution and laws of the nation . . .

> The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial."

*Mitchum v. Foster*, 407 U.S. 225, 238–239 (1972).

Thus, to state a cause of action under §1983, a plaintiff must allege that some "person" has deprived him of a federal right while acting under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). A suable "person" for 1983 purposes may include all natural persons, corporate entities, associations and the like. In addition, cities, counties and other local government entities, are suable as "persons" when an unconstitutional custom or policy on the part of that entity is alleged. *Monell v. Dept. of Social Services*, 436 U.S. 653 (1978); *see also Pembaur v. City of Cincinnati*, ___ U.S. ___, 106 S.Ct. 1292 (1986). Similarly, suits against public servants and officials in their official capacities must allege an unconstitutional custom or policy within the meaning of *Monell* in order to survive a motion to dismiss. *Kentucky v. Graham*, ___ U.S. ___, 105 S.Ct. 3099 (1985). Despite *Monell*, however, states and their agencies are not considered to be "persons" suable directly under §1983, and the Eleventh Amendment still operates to bar such suits in federal court. *Quern v. Jordan*, ___ U.S. ___ (1979). Likewise, where a government official is the nominal defendant in a suit for damages, but the action is really against the state because the demand is for state money or property, it is clear that such suit is barred by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974).

Aside from the number of governmental entities which are not "persons" within the meaning of §1983, however, there exists certain classes of individual defendants — clearly "persons" — who may avail themselves of the doctrine of immunity. Immunity in its purest form is known as "absolute immunity," while a more temperate version of immunity is known as "qualified immunity." The essential difference between

the two types of immunity is that absolute immunity requires an inquiry only into the functional status of the defendant while qualified immunity typically necessitates an inquiry into the defendant's state of mind. In most instances, then, an action against an absolutely immune defendant may be dismissed on motion setting out the defendant's status as well as an allegation of action within his official capacity. See generally, Nahmod, *Civil Rights and Civil Liberties Litigation*, §701 *et seq.* (1979).

Among the various classes of persons who are absolutely immune from suits for damages under 1983, are state and regional legislators, prosecutors and judges. With respect to legislative immunity, the Supreme Court, relying on the common law tradition of absolute legislative immunity from tort liability and the policy underlying the speech or debate clause, Article I, Section 6, of the United States Constitution, has held that legislators acting within a "traditional legislative capacity" are immune from 1983 damages. *Tenney v. Brandhove*, 341 U.S. 167 (1951). Thus, any inquiry into legislative motive is irrelevant, and the remedies for any corruption must be found within the political process and the criminal laws. *O'Shea v. Littleton*, 414 U.S. 488 (1974).

Borrowing similar concepts of immunity from the historical common law as in *Tenney, supra*, the Supreme Court established the right of public prosecutors to absolute immunity in *Imbler v. Pachtman*, 424 U.S. 409 (1976). Under *Imbler*, prosecutors are absolutely immune from tort liability with respect to their decisions to initiate and conduct prosecutions as well as with respect to their advocacy functions in the criminal process. As with *Tenney, supra*, the policy underlying *Imbler* is the securing of independent and undeterred discretion in the initiation of criminal prosecutions as well as the securing of all relevant evidence. 424 U.S. at 426.

Also deeply rooted in history and relevant for purposes of the instant motion is the absolute immunity accorded to members of the judiciary. This principal was first set forth by the Supreme Court in *Bradley v. Fisher*, 13 Wall. 335 (1872),

wherein the court recognized the need for absolute immunity in order to protect judges from lawsuits claiming that their decisions had been tainted by improper motives. Thus, in order to maintain "that independence without which no judiciary can either be respectable or useful," *Id.* at 347, the court held judges to be immune from civil suit in cases where they were exercising their judicial functions within the general scope of their jurisdiction. Moreover, since constitutional immunity for state officials is the mirror image of that for federal officials, the Supreme Court extended the absolute immunity doctrine to state judges sued on federal constitutional claims in *Pierson v. Ray,* 386 U.S. 547 (1967).

Additionally, aside from individuals who are clearly "judges" — and thus entitled to absolute immunity — such immunity is further applicable to individuals exercising roughly the same functions. Such "quasi-judicial immunity" includes within its embrace grand jurors, prosecutors, administrative law judges, hearing officers and the like. See *Imbler v. Pachtman,* 424 U.S. 409, 423 (1976); *Butz v. Economou,* 438 U.S. 478, 512 (1978). As the *Butz* court made clear, the availability of such quasi-judicial immunity depends not on whether the individual at issue is a member of the judicial, legislative or executive branch. Rather, the test is whether the individual at issue exercises duties which are "functionally comparable" to that of a judge. *Butz,* 438 U.S. at 513. In determining whether the proceedings at issue are the functional equivalent of a judicial proceeding — and thus appropriate for the extension of absolute immunity — the following factors should be considered: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. *Cleavinger v. Saxner,* 106 S. Ct. 496, 501 (1985).

Applying these considerations to the facts of the instant case, the Court finds that the Defendant stewards herein

were performing duties functionally equivalent to that of a judge, and thus are entitled to quasi-judicial absolute immunity. First, it is clear that the Office of the Racing Commissioner must be free and independent to perform their investigatory and adjudicatory functions without fear of harassment or intimidation. Because of the sport's susceptibility to fraud and corruption, Michigan has proclaimed a strong public interest in the strict regulation of horse racing in order to preserve public confidence. *Berry v. Racing Commissioner*, 116 Mich. App. 164 (1982). As they are vested with the regulatory and enforcement responsibility for the Office of the Racing Commissioner, it is crucial that racing stewards such as the Defendants herein receive some sort of insulation from undue influence, harassment or intimidation. In this important area of public interest, the quasi-judicial enforcement decisions of the racing stewards often involve large sums of money; intense controversy, and charges of corruption and dishonesty which threaten the reputation of the entire state. Needless to say, there is an ever present danger that persons receiving an adverse decision may retaliate and seek vengence in the courts alleging some sort of impropriety in the decision making process. These policy factors are the functional equivalent of similar policy factors involved in any ordinary civil or criminal lawsuit.

Second, it is clear that adequate procedural safeguards exist to protect the integrity of the hearing process in the Office of the Racing Commissioner. The racing stewards' function is a classic adjudicatory one in that they are free from third party influence in the performance of their decision making duties. As such a neutral and detached hearing body, the status of the racing stewards is clearly independent. Moreover, the hearing itself bears many of the characteristics of an ordinary judicial proceeding. Here, Plaintiff Friedman enjoyed the representation of counsel, the right to present evidence, the right to cross-examine witnesses, and the right to a written final order setting forth the reasons for the action taken by the Racing Commissioner as

well as a copy of the final order. M.C.L.A. §431.71(5) (West Supp. 1986). Additionally, the stewards' decision was appealable to the Racing Commissioner as a matter of right, and further appealable to the state circuit court for the county in which the alleged act or failure took place. *Id.* Such procedural safeguards as well as rights of appeal lend substantial integrity to the decision making process herein.

It is clear from the above then that the stewards herein were engaged in a quasi-judicial function, functionally equivalent to that of a judge. This being the case, they are absolutely immune from suits for damages for acts arising from the exercise of duties within their jurisdiction. Since there is no evidence whatsoever that Defendants herein acted outside of their jurisdiction, Defendants Hall, Kennedy and Wright are absolutely immune. Moreover, since Defendant Meharg's only involvement in this quasi-judicial proceeding was as that of a witness, he too is absolutely immune from the instant damages suit. *Briscoe v. Lahue*, 460 U.S. 325 (1983). Accordingly, Defendants' Motion for Summary Judgment is hereby GRANTED and this matter DISMISSED.

IT IS SO ORDERED.

/s/ L. P. ZATKOFF

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

HERBERT W. FRIEDMAN,
*Plaintiff,*

vs.

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual,
and FRANK MEHARG, an individual,
*Defendants.*

Case No.
85-CV-72940-DT

Honorable
Lawrence P. Zatkoff

## JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated January 12, 1987.

Dated at Detroit, Michigan, this 12th day of January, 1987.

ROBERT A. MOSSING
CLERK OF THE COURT

BY: /s/ R.C. BRAD
DEPUTY CLERK

APPROVED:
/s/ L. P. ZATKOFF
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT
OF THE UNITED STATES

HERBERT FRIEDMAN,

Petitioner,

vs.

PATRICK HALL, an indivdiual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an indivdiual,
and FRANK MEHARG, an individual,

Respondents.
_____/

CERTIFICATE OF SERVICE

I, KENNETH M. MOGILL, in compliance with Supreme Court Rule 28.4(a) and 28.5(b) does hereby certify that he is a member of the Bar of the Supreme Court and that on the 8th day of July, 1988, did deposit in the United States Mail, via Express Mail Service, with postage fully prepaid, one (1) copy of the Petition for Writ of Certiorari addressed to Clerk, Supreme Court of the United States, Washington, D.C. 20543, with first class postage prepaid, and that, to counsel's knowledge, the mailing took place on said date and that said mailing was within the permitted time.

_____
KENNETH M. MOGILL

Subscribed and sworn to before
me this 8th day of July, 1988.

_____
Notary Public
County of Wayne, Acting in Oakland County
My Comm. Expires: 5-20-89

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

HERBERT M. FRIEDMAN,
*Petitioner*,

-VS-

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual,
and FRANK MEHARG, an individual.
*Respondents*.

## APPEARANCE OF COUNSEL

Please enter my appearance as counsel for HERBERT M. FRIEDMAN, Petitioner in the above-entitled cause. I certify that I am a member of the Bar of the Supreme Court of the United States.

Respectfully Submitted,

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No. 88-57 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

HERBERT M. FRIEDMAN,

Petitioner,

v.

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual, and
FRANK MEHARG, an individual,

Respondents.

On Petition for Writ of Certiorari to the
Sixth Circuit Court of Appeals

# BRIEF OF RESPONDENTS IN OPPOSITION

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49 pgs

# QUESTIONS PRESENTED FOR REVIEW

I.

Are Respondents entitled to qualified immunity from Petitioner's civil rights action for damages under 42 USC §§ 1983 and 1985?

II.

Was the issue of Respondents' right to qualified immunity preserved for appellate review?

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## STATEMENT OF THE CASE

Pari-mutuel horse racing in Michigan is legalized, licensed and regulated pursuant to the Michigan Racing Law of 1980, as amended; MCL 431.61 et seq, and the rules of the Racing Commissioner promulgated thereunder. The provisions of the Racing Law and rules in effect during 1982, as described herein, are not contested by the parties.

No person may participate in Michigan pari-mutuel racing in any racing occupation unless licensed annually by the Commissioner. Petitioner was licensed by the Commissioner to participate in pari-mutuel racing in Michigan during the year 1982 as both a veterinarian and a race horse owner.

Respondents Hall, Kennedy and Meharg were appointed and approved by the Racing

Commissioner pursuant to state statute and rule as independent contractors, to serve as the three required racing stewards or judges at the 1982 Saginaw Valley Downs race meeting. As the assigned stewards, they served as special deputies and representatives of the Racing Commissioner at Saginaw Valley Downs. They held both the title and function of racing judge at the meet, and were charged by statute and administrative rule with the duty and responsibility of enforcing the state racing law and rules of the Commissioner at the meet. In the exercise and discharge of their enforcement function, Respondent stewards were broadly empowered by statute and rule to conduct hearings and investigations concerning alleged rule violations; to examine witnesses under

oath regarding such violations; to make findings of fact and determine violations; and to decide and impose penalties against rule violators. Such penalties could include, in their discretion, suspension of the violator's racing license and racetrack privileges for whatever period the stewards deemed appropriate. All decisions and rulings of the stewards were appealable as of right to the Commissioner and to the state circuit court.

On June 9, 1982, licensed trainer Linda Droscha made a complaint to a state investigator at Saginaw Valley Downs regarding certain alleged misconduct by Petitioner at the track earlier that evening. In particular, Droscha alleged the following: that she had observed Petitioner enter the receiving barn and go

into the stall occupied by "Propolis", the horse that subsequently won the fourth race that evening; that she then observed Petitioner hand what appeared to be a loaded hypodermic syringe and needle to the owner of the horse inside the stall; that she next observed the owner take the needle and syringe around behind the horse out of her view, while Petitioner appeared to bend down and examine the front legs of the horse; that she believed that the owner may have illegally injected the horse with a drug while out of her view, because when he came back around from behind the horse, he returned an empty syringe and needle to Petitioner; that she then observed Petitioner take the needle and syringe and leave the horse's stall and exit the receiving barn.

The state investigator subsequently reported Droscha's allegations to Respondent stewards at the conclusion of the racing program on June 9, 1982. If true, Petitioner's alleged conduct constitutued a violation of Rule 59, which expressly prohibited all persons from entering the receiving barn on race night except the owners, trainers, drivers and grooms of the horses competing in that night's races, and such other persons specifically authorized by the Racing Commissioner. In addition, Petitioner's alleged conduct, if true, also constituted a violation of other provisions in the racing law and rules of the Commissioner which prohibited the possession of hypodermic needles and syringes and injectable drugs in restricted areas at

the track, such as the receiving barn, and the administration of drugs to race horses after they were entered to race. Because of the seriousness of the charges, Respondent stewards notified Petitioner of the charges the next day, and informed him that they were going to schedule and conduct a stewards hearing concerning the charges, to determine whether he had violated the racing law or rules of the Commissioner.

On June 24 and June 29, 1982, Respondent stewards conducted the hearing. During the hearing, the stewards received sworn testimony from Droscha, Petitioner, and several other witnesses, including Respondent Wright--a classified civil service employee of the Michigan Office of Racing Commissioner, employed in the

capacity of outstate racing supervisor. Petitioner was present throughout the two-day hearing and was advised by the stewards on the record at the start of the hearing that he could have an attorney represent him at the hearing if he wished. Petitioner chose to proceed with the hearing without counsel. During the hearing, Petitioner was permitted to confront and cross-examine each witness called by the stewards; to summon and question witneses on his own behalf; and to testify under oath and present argument on his own behalf. Both sessions of the hearing were tape recorded by the stewards and subsequently transcribed for administrative and judicial review.

During the hearing, Droscha essentially reiterated her previous

allegations against Petitioner under oath. Another witness, Charles Bond, testified that Droscha had informed him, prior to the fourth race on June 9, 1982, that she had witnessed Petitioner's apparent involvement in the injection of "Propolis" earlier that evening in the receiving barn. According to Bond, he subsequently saw Petitioner in the grandstand area after the fourth race and commented to him that the shot he had given "Propolis" must have worked since the horse won the race. According to Bond, Petitioner responded that it was just camphor, that the horse needs it and gets it every day. Respondent Wright provided testimony concerning two prior incidents during 1980 and 1981 at Jackson Harness Raceway in which Petitioner had been warned by racing

officials for similar violation of Rule 59 involving unauthorized veterinary contact with race horses on race night after they had been sequestered in the receiving barn. Petitioner admitted to the stewards during the hearing that he had entered the receiving barn at Saginaw Valley Downs on June 9, 1982, prior to the start of racing, to examine a cut on the leg of "Propolis" at the request of the horse's owner, but without required authorization of the Commissioner, in violation of Rule 59. However, he denied that he had ever possessed or handled a hypodermic needle or syringe while he was with "Propolis" in the receiving barn. He also denied any knowledge or involvement in the administration of any injection to "Propolis" in the receiving barn on

June 9, 1982, prior to the horse's participation in the fourth race.

On July 4, 1982, Respondent stewards joined in issuing a written ruling and Notice of Suspension against Petitioner based upon the testimony received during the stewards' hearing. In their ruling, the stewards found that Petitioner had knowingly and willingly entered the receiving barn at Saginaw Valley Downs on June 9, 1982, without necessary authorization, and had practiced veterinary medicine on "Propolis", in violation of Rule 59, after having already received two previous warnings from stewards regarding similar violations of Rule 59. The stewards concluded that Petitioner's conduct was detrimental to the best interests of Michigan racing, and

consequently ordered his license to participate in Michigan racing suspended and ruled him off the grounds of all Michigan racetracks from July 7, 1982 through December 31, 1982.

On July 7, 1982, Petitioner appealed to the Racing Commissioner for de novo review of the stewards' ruling and also requested a stay of the ruling pending the Commissioner's review and final decision on his appeal. The Commissioner denied Petitioner's request for a stay.

After the Commissioner's denial of his request for a stay of the stewards' ruling, Petitioner never attempted to obtain injunctive relief from the state circuit court to stay enforcement of the stewards' ruling during the pendency of

his appeal, although such judicial relief was potentially available under Michigan law. Hiers v Detroit Superintendent of Schools, 370 Mich 225, 136 NW2d 10 (1965); Reed v Civil Service Commission, 301 Mich 137, 3 NW2d 41 (1942).

Pursuant to Petitioner's appeal, a de novo hearing was scheduled and conducted on August 3, 1982, under the contested case provisions of the Michigan Administrative Procedures Act, MCL 24.271-24.287. The hearing was conducted by the Racing Commissioner's designated hearing officer, Deputy Commissioner John Conley.

On or about November 8, 1982, Mr. Conley submitted a written opinion to the Racing Commissioner recommending to the

Commissioner that he grant Petitioner's appeal and reverse the stewards' ruling. On or about December 21, 1982, the Racing Commissioner issued an order adopting Mr. Conley's opinion and reversing the stewards' ruling.

On July 1, 1985, Petitioner filed a civil rights Complaint in the United States District Court for the Eastern District of Michigan against Respondent stewards and Respondent Wright, under 42 USC §§ 1983 and 1985, essentially claiming in extremely broad and conclusory language that Respondents, acting separately and in conspiracy with each other, had "wilfully", "maliciously" and "unlawfully" exercised their power and position as state racing officials at the 1982 Saginaw Valley Downs race meeting "in bad faith",

by suspending his racing license and racetrack privileges "because of his religion".

Respondents initially responded to Petitioner's Complaint by timely filing answers with the District Court, denying Petitioner's claims and also asserted several affirmative defenses, including their entitlement to absolute or qualified immunity from Petitioner's suit.

On September 16, 1986, after the deadline for completing discovery had passed, Petitioner filed a Motion to Amend his Complaint, claiming that unspecified evidence obtained during discovery did not conform with his Complaint. In his Motion, Petitioner failed to state how he wished to amend his Complaint and gave no

specific reason why late amendment of his Complaint was either warranted or necessary. Respondents filed a written response opposing Petitioner's Motion for the reason that it was untimely and failed to state sufficient grounds or reasons to permit late amendment of the Complaint under FRCP 15. Thereafter, the Motion to Amend was never pursued further by Petitioner nor acted upon by the Court.

On October 3, 1986, after completion of discovery and more than 14 months after Petitioner had filed his Complaint, Respondents filed a Motion for Dismissal and/or Summary Judgment pursuant to FRCP 12(b)(6) and FRCP 56(b)(c), respectively, contending that they were entitled to summary judgment and/or dismissal based upon their entitlement to the defense of

absolute quasi-judicial immunity or, in the alternative, qualified good faith immunity. In addition, Respondents further contended in their Motion that they were entitled to dismissal and/or summary judgment because the allegations in Petitioner's Complaint were so vague, broad, conclusory and devoid of factual support or content that they were insufficient as a matter of law to state a claim upon which relief could be granted, and further, that there were no genuine issues of material fact for trial as to Petitioner's conclusory claims and Respondents' entitlement to immunity. In support of their Motion, Respondents filed extensive detailed affidavits attesting to their good faith and lack of religious bias or malice in the performance of their

respective official actions toward Petitioner. The stewards, in particular, attested in their affidavits to the specific legal authority, evidentiary support and reasons for the disciplinary action and penalties they had imposed against Petitioner. All four Respondents attested in their affidavits that Respondent Wright had no involvement in the decision to sanction Petitioner, and that his only involvement in the disciplinary proceedings against Petitioner had been that of a sworn witness during the stewards' hearing.

Petitioner subsequently sent a written answer and brief in opposition to Respondents' Motion to United States District Judge Lawrence P. Zatkoff, the assigned trial judge. In his response,

Petitioner argued that Respondents were not entitled to immunity and that Respondents' Motion was inappropriate on the "dawn of trial". In addition, Petitioner represented to the Court in his brief that he stood ready and able to produce several unnamed witnesses who could present unspecified evidence in support of his claims of bad faith, malice and religious bias on the part of Respondents. Despite his affirmative obligation under FRCP 56(e), Petitioner failed to present any evidence whatsoever to the Court by affidavit, deposition, exhibit or otherwise to show that there was a genuine issue for trial.

On October 24, 1986, the Final Pretrial Order, prepared and submitted jointly by the parties, was accepted and

entered by Judge Zatkoff. In the Final Pretrial Order, Petitioner stipulated and conceded that he did not contest the fact ... "That Respondents Hall, Kennedy, and Meharg were acting during the course of their employment and within the scope of their authority as the racing stewards and judges at the 1982 Saginaw Valley Downs race meeting when they decided and issued their ruling of July 4, 1982, against Dr. Friedman suspending his occupational licenses and denying him the privileges of the grounds of all licensed Michigan racetracks from July 7, 1982 through December 31, 1982." (R.34: Final Pretrial Order, Uncontested Facts, ¶ III.CC). Thereafter, the case was placed on the trailing trial docket for November and December, 1986, and January, 1987.

On January 12, 1987, Judge Zatkoff granted Respondents' Motion for Summary Judgment, finding that Respondents Hall, Kennedy and Meharg were absolutely immune from suit because of their quasi-judicial function as stewards in adjudicating and penalizing rule violations, and that Respondent Wright was also absolutely immune from suit as a witness under Briscoe v Lahue, 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108 (1983).

Petitioner filed a timely appeal with the Court of Appeals for the Sixth Circuit, arguing in his brief on appeal that Respondents were not entitled to either absolute or qualified immunity. In response, Respondents argued in their brief on appeal that they were entitled to absolute quasi-judicial immunity or, in the alternative, qualified immunity.

On April 11, 1988, the Court of Appeals affirmed the decision of the District Court granting Respondents' Motion for Summary Judgment, but on different grounds, finding that "... Although ... absolute immunity may be warranted in this case under the teachings of Butz and Cleavinger, ... here defendants have established a claim of qualified immunity." (Petitioner's Appendix A, p A-6, including n. 4). With respect to Respondent Wright, the Court of Appeals expressly concluded that he was entitled to immunity under Briscoe v Lahue, supra, since Petitioner had offered no response to rebut Respondents' affidavits attesting to Wright's lack of participation in the decision to issue the stewards' ruling against Petitioner.

(Petitioner's Appendix A, p A-6). Finally, after review of the record on appeal, the Court of Appeals found that Petitioner had presented no evidence of religious bias on the part of the Respondents, and had failed to make out a prima facie case showing the existence of any material issue of fact for trial. (Petitioner's Appendix A, p A-7). Accordingly, the Court of Appeals affirmed summary judgment for Respondents, based upon their entitlement to qualified immunity.

## REASONS FOR DENYING THE WRIT

### I.

**THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT RESPONDENTS HAD AT THE VERY LEAST ESTABLISHED THEIR CLAIM TO QUALIFIED IMMUNITY AND WERE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF SUCH IMMUNITY.**

The dispute in this matter does not involve competing theories of law, but rather, the application of the established law to the facts on the record. Both parties agree that the controlling standard for determining whether a public official is entitled to the defense of qualified immunity was established by this Court in Harlow v Fitzgerald, 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727 (1982).

In Harlow v Fitzgerald, supra, this Court enunciated and established the

controlling principles and guidelines for determining whether a public official is entitled to the defense of qualified immunity, as opposed to absolute immunity, from civil rights damage suits arising out of the official's exercise and discharge of official discretionary duties.

As noted in Harlow, 457 US at 806-807, the decisions of this Court have consistently held that government officials are entitled to the defense of either absolute or qualified immunity from civil rights damage suits based upon their exercise and discharge of discretionary official functions. Scheuer v Rhodes, 416 US 232, 240, 40 L Ed 2d 90, 94 S Ct 1683 (1974); Butz v Economou, 438 US 478, 496-497, 57 L Ed 2d 895, 98 S Ct 2894 (1978).

In determining the extent of immunity which public officials should have from civil rights damage suits for their official actions, this Court has attempted to balance two competing interests: the need for private lawsuits as a means of protecting civil rights and deterring unconstitutional conduct by public officials versus the public's need to encourage decisive official action in the public interest by protecting the official from suit. Harlow, 457 US at 813-814.

In attempting to strike the best balance between these two competing interests, this Court has determined that in general qualified immunity is the norm for most executive officials, and absolute immunity the exception. Harlow, 457 US at 807. This judicial determination has been

made with the assumption and expectation that the general availability of the defense of qualified immunity will permit executive officials to quickly obtain dismissal or termination of insubstantial civil rights damage suits through a properly supported motion for dismissal and/or summary judgment under FRCP 12(b)(6) or 56(b)(c), respectively. Harlow, 457 US at 808, 814; Butz, 438 US at 507-508.

Under Harlow, an official's entitlement to the defense of qualified immunity depends upon a wholly objective appraisal of the legal reasonableness of the official's discretionary actions, as measured by reference to clearly-established law. According to the Harlow standard for qualified immunity, officials

who perform discretionary functions are immune from suit for their official discretionary acts, if such acts do not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. Harlow, 457 US at 818.

Application of the current standard for qualified immunity and the related underlying guidelines and principles for determination of official immunity enunciated and established by this Court in Harlow v Fitzgerald, supra; Butz v Economou, supra; Cleavinger v Saxner, 474 US ____, 88 L Ed 2d 507, 106 S Ct 496 (1985); and Briscoe v LaHue, 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108 (1983), to the uncontroverted facts of this case, clearly indicates that the Court of

Appeals was correct in its holding that Respondents had established their claim to qualified immunity and were entitled to summary judgment on that basis.

First of all, based upon the unopposed and uncontroverted affidavits of Respondents, it is clear that Respondents were performing discretionary quasi-judicial functions within the scope of their statutory authority and responsibility as state racing officials, when they conducted the administrative disciplinary proceedings against Petitioner for his admitted violation of Rule 59.

Secondly, based upon the unopposed and uncontroverted affidavits of Respondents, it is equally clear that Respondents'

quasi-judicial conduct toward Petitioner in such disciplinary proceedings did not violate any clearly established statutory or constitutional rights of Petitioner of which a reasonable person in Respondents' position would have known.

A. RESPONDENTS WERE PERFORMING QUASI-JUDICIAL DISCRETIONARY FUNCTIONS WHEN THEY ALLEGEDLY VIOLATED PETITIONER'S CIVIL RIGHTS.

Both the District Court and the Court of Appeals properly followed a "functional approach" in analyzing the record in this case to determine whether Respondents were entitled to summary judgment on their motion under FRCP 56(b)(c) based upon their claim of either absolute or qualified immunity.

The only evidence in the record was provided by the affidavits and exhibits

submitted by Respondents in support of their summary judgment motion, since Petitioner, contrary to his obligation under FRCP 56(e), failed to present any evidence by affidavit, deposition, exhibit or otherwise to contradict Respondents' affidavits.

Petitioner essentially alleged in his Complaint, in broad conclusory language, that Respondents had maliciously and unlawfully exercised their power as state racing officials to enforce Rule 59 against him as a pretext for suspending his racing license and racetrack privileges and causing him harm "because of his religion."

According to the unopposed and uncontroverted affidavits of Respondent

stewards, they had investigated, adjudicated and penalized Petitioner for violation of Rule 59 at the 1982 Saginaw Valley Downs race meeting in good faith and without religious bias, pursuant to their broad discretionary authority and duty, as stewards and special deputies of the Racing Commissioner, under the state racing law and rules of the Commissioner. Applying the guidelines and principals of Butz and Cleavinger to the facts of this case, the District Court and the Court of Appeals both found that the stewards were independent, high level state racing officials who exercised and discharged quasi-judicial functions analogous to those of a judge or prosecutor when they conducted investigations and imposed penalties to enforce the racing law and

rules of the racing commissioner. As previously noted, Petitioner himself conceded in the Joint Final Pre-Trial Statement (R.34 ¶ III.CC) that Respondents stewards ... "were acting during the course of their employment and within the scope of their authority as ... racing stewards and judges ...", when they suspended his racing license and racetrack privileges for violation of Rule 59 at the 1982 Saginaw Valley Downs race meeting. Thus, it is evident from the record and the opinions of both lower courts that Respondent stewards were clearly performing quasi-judicial discretionary functions within the scope of their official authority, when they allegedly violated Petitioner's civil rights.

As to Respondent Wright, the record is equally clear that he too performed a

discretionary quasi-judicial function when he participated in the disciplinary proceedings against Petitioner. In particular, as noted by both of the lower courts in their respective opinions, the unopposed and uncontroverted affidavits of Respondents indicate that Wright's only involvement in the proceedings against Petitioner was as a witness at Petitioner's stewards' hearing. Thus, both Courts correctly concluded that Wright was entitled to immunity under Briscoe v Lahue, supra.

B. RESPONDENTS' OFFICIAL DISCRETIONARY CONDUCT DID NOT VIOLATE ANY CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHTS OF PETITIONER.

In accordance with the Harlow standard for qualified immunity, none of the quasi-judicial discretionary conduct performed

by Respondents in the disciplinary proceedings against Petitioner violated any statutory or constitutional rights of Petitioner of which a reasonable person would know. Rule 59 was one of the rules which the stewards were both empowered and obliged to enforce at the 1982 Saginaw Valley Downs race meeting. Petitioner admitted that he had violated the rule at the meet and that he had also been given two previous warnings for similar violations of Rule 59 at another track. By rule of the Commissioner, the stewards had broad authority and discretion to determine and impose penalties for violation of Rule 59. Such penalties could include suspension of the violator's racing license and racetrack privileges for whatever period the stewards deemed

appropriate. In view of the foregoing uncontroverted facts, the stewards could not be expected to know that their good faith suspension of Petitioner's racing license and racetrack privileges for violation of Rule 59 would violate Petitioner's civil rights. On the contrary, the conduct of the stewards and Mr. Wright during the disciplinary proceedings against Petitioner was wholly within the lawful scope of their authority and duties as state racing officials under the state racing law and rules of the Commissioner, and, on its face, did not violate any clearly established statutory or constitutional rights of Petitioner, based on the record.

Petitioner's claim in his petition that Respondents' conduct was ultra vires

and, therefore, not immune, because their official conduct toward Petitioner was allegedly performed in bad faith, with malice and religious bias, for the unlawful purpose of suspending his racing license and racetrack privileges because of his Jewish faith, has absolutely no factual basis or support in the Complaint or the record. Petitioner's claims are nothing more than factually bare conclusory allegations of impermissible subjective intent and purpose of the type specifically disfavored in Harlow, 457 US at 810. When Respondents filed their Motion for Summary Judgment with supporting affidavits and exhibits, Petitioner could no longer rest upon the broad conclusory claims of malice, bad faith and religious bias in his Complaint.

Under FRCP 56(e), Petitioner had an affirmative obligation to present specific evidence of factual support for such claims by way of affidavit or otherwise to show that there was a genuine issue of material fact regarding such claims for trial. As noted by the Court of Appeals, Petitioner presented no evidence of factual support for his claim of religious bias or other alleged improper intention, motive or purpose on the part of Respondents. Accordingly, based on the record, the Court correctly concluded that Petitioner had failed to make out a prima facie case to show the existence of any issue of material fact relative to such claims for trial.

In Harlow, this Court reaffirmed its position and expectation that

insubstantial civil rights damage suits against public officials, which are based upon broad, conclusory, factually-bare allegations of bad faith, malice, religious bias or other impermissable subjective intent or purpose--like Petitioner's suit--should not suffice to subject officials to trial, and should be terminated by federal courts on a properly supported motion for summary judgment under FRCP 56(b)(c). 457 US at 808, 815-818. Consistent with this admonition and the other controlling principles enunciated by this Court in Harlow, the Court of Appeals was correct in concluding that Respondents had factually and legally established their alternate claim of qualified immunity, and were, therefore, entitled to summary judgment pursuant to

their properly supported motion under FRCP 56(b)(c).

Accordingly, for all of the foregoing reasons, the decision of the Court of Appeals affirming summary judgment was correct and Petitioner's petition should therefore be denied.

II.

THE ISSUE OF RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY FROM PETITIONER'S CIVIL RIGHTS DAMAGES SUIT WAS PLED AND BRIEFED IN BOTH DISTRICT COURT AND THE COURT OF APPEALS, AND THEREFORE, WAS PROPERLY BEFORE THE COURT OF APPEALS.

The issue of qualified immunity was initially raised by Respondents in District Court as one of their asserted affirmative defenses in their respective Answers to Petitioner's Complaint. Thereafter, it was raised again in District Court as an alternative basis for summary judgment in Respondents' Motion and Brief for Summary Judgment. On Petitioner's subsequent appeal to the Sixth Circuit Court of Appeals from the District Court, Petitioner and Respondents each submitted appellate briefs to the Court of Appeals wherein they each

specifically briefed the issue of Respondents' entitlement to either absolute immunity or qualified immunity.

It is a basic tenet of federal appellate law, that any issue which is pled and briefed in District Court is preserved for appellate review and decision in the Court of Appeals as a ground for affirming or reversing the District Court, even if the District Court did not decide the issue or base its questioned decision on the issue. Several decisions of this Court, including one of the cases cited by Petitioner, McGrath v Manufacturer's Trust Co, 338 US 241, 70 S Ct 4, 94 L Ed 31 (1941), support this principal. In McGrath, this Court essentially stated that it would only review issues on appeal which had been

raised in the trial court pleadings. 338 US at 249.

More directly on point with Petitioner's contention, this Court expressly held in Jaffke v Dunham, 352 US 280, 281, 1 L Ed 2d 314, 77 S Ct 307 (1957), that on appeal in the Court of Appeals:

> "A successful party in District Court may sustain its judgment on any ground that finds support in the record."

Furthermore, the Ninth Circuit Court of Appeals in Helena Rubenstein, Inc v Bau, 433 F2d 1021, 1023 (9th Cir, 1970), citing Jaffke, supra, and several other cases, held that:

> " ... it is proper for this court to affirm a summary judgment on any ground that appears from the record, whether or not the trial relied on it."

For all of the foregoing reasons, Petitioner's argument that the Court of

Appeals was without authority to decide the issue of qualified immunity, as an alternate basis for affirming summary judgment, is without merit; and accordingly, his petition should be denied by this Court.

## RELIEF

For the foregoing reasons, Petitioner has failed to set forth any grounds for which the writ should be granted under Supreme Court Rule 17, and accordingly, his petition for writ of certiorari should be denied.

Respectfully submitted,

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